

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

THOMAS D. COLE,

Plaintiff,

-against-

WPIX, INC. (owner of "NOW IT CAN BE TOLD"
a nationally syndicated television
program), WNBC, THE NATIONAL BROADCASTING
CO., and BROOKE SKULSKI,

Defendants.

Index No.

MEMORANDUM OF POINTS AND AUTHORITIES IN
SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER

PRELIMINARY STATEMENT

The within memorandum is submitted in support of plaintiff's motion for a temporary restraining order staying defendants' proposed, unauthorized broadcast, on or about March 25, 1992, of two intensely personal, videotaped interview concerning sexual harassment of plaintiff, including, inter alia,

"sexual contact" as defined by §130.00(3) of the Penal Law,¹ between plaintiff and a certain employee of his employer, the World Wrestling Federation ("WWF"). As discussed herein the proposed broadcast is in breach of an express, written contract between plaintiff and "Now It Can Be Told" ("NICBT") and is in derogation of Sec. 50-b² of New York's Civil Rights Law, which prohibits disclosure of the identity of any victim of a sexual

1. Sec. 130.00(3) of the Penal Law provides:

The following definitions are applicable to this article:

1. . . .
2. . . .
3. "Sexual contact" means any touching of the sexual or other intimate parts of a person not married to the actor for the purpose of gratifying sexual desire of either party. It includes the touching of the actor by the victim, as well as the touching of the victim by the actor, whether directly or through clothing.

2. Section 50-b of the Civil Rights Law provides in pertinent part:

§ 50-b. Right of privacy; victims of sex offenses.

1. The identity of any victim of a sex offense, as defined in article one hundred thirty or Section 255.25 of the penal law, shall be confidential. No report, paper, picture, photograph, court file or other documents, in the custody or possession of any public officer or employee, which identifies such a victim shall be made available for public inspection. No such public officer or employee shall disclose any portion of any police report, court file, or other document, which tends to identify such a victim except as provided in subdivision two of this section

offense as defined in Sec. 130 or 255.25 of the Penal Law and/or of facts which may tend to identify such victim. In the absence of injunctive relief, defendants' proposed broadcast threatens imminent, irreparable injury to plaintiff's reputation and to his mental and emotional well-being. The proposed broadcast is both legally and morally indefensible. As discussed herein, the balance of equities clearly favors plaintiff's position.

FACTS

A statement of the pertinent facts is set forth in the affirmation of Alan L. Fuchsberg, Esq., counsel for plaintiff Thomas D. Cole, and in the plaintiff's own affidavit in support of the requested relief. The Court is respectfully referred to these documents for a complete statement of the facts.

ARGUMENT

The well-known prerequisites to preliminary injunctive relief are: (1) likelihood of success on the merits of the underlying action; (2) the threat of imminent, irreparable injury absent injunction; and (3) a balancing of the equities. See CPLR 6301; see also Aetna Ins. Co. v. Capasso, 75 N.Y.2d 860, 552 N.Y.S.2d 918 (1990); Kaufman v. International Business Machines Corp., 97 A.D.2d 925, 470 N.Y.S.2d 720 (2d Dept. 1983), aff'd, 61 N.Y.2d 930 (1983). The single prerequisite for grant of a temporary restraining order is the threat of immediate and irreparable injury, loss or damage pending a hearing for a preliminary injunction. See CPLR 6301.

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Incontrovertibly, the loss of self-esteem and privacy which plaintiff fears as a result of the proposed broadcast would be irreparable. Money damages will not erase from the public mind the taint of homosexual involvement, however minimal or unsolicited, to which plaintiff was subjected while he was employed with the WWF, nor can it erase from plaintiff's mind the shame and discomfort he will bear, life-long, if the titillating details of his experience are made public.

Plaintiff has no adequate remedy at law if "NICBT" elects to breach its own contractual undertaking, as it has threatened to do. Thus, plaintiff's underlying suit is one for a declaratory judgment construing the parties' letter agreement (the "Contract") and preliminary and permanent injunctive relief which, in essence, merely requires the specific performance of their contractual agreement, whereby plaintiff, alone, has the power to disclose his story to the public by electing to file a lawsuit against his former employer. Plaintiff's suit is also founded on his statutory right of privacy contained in Sec. 50-b of New York's Civil Rights Law and for a declaration of his right to damages in the event the tapes are aired.

Plaintiff has elected not to sue the WWF, as is his unfettered right under the Contract, and, in fact, has amicably settled his claims against his employer. (See Cole Aff. at ¶ 7). Were this Court to inquire into the merits of plaintiff's underlying action, as it must upon a hearing

regarding plaintiff's entitlement to a preliminary injunction, it may be assured of plaintiff's likelihood of success on the merits and the balance of equities favoring such relief.

The express terms of the parties' clear, simple contract may be construed as a matter of law. See W.W.W. Associates, Inc. v. Giancontieri, 77 N.Y.2d 157, 565 N.Y.S.2d 440 (1990) (When parties set down their agreement in a clear, complete document, it should as a rule be enforced according to its terms); Slatt v. Slatt, 64 N.Y.2d 966, 488 N.Y.S.2d 645 (1985) ("Courts may not fashion new contract under guise of contract construction; rather, they are required to discern intent of parties by what they wrote"); Fiore v. Fiore, 46 N.Y.2d 971, 415 N.Y.S.2d 826 (1979); Taitelbaum Holdings, Ltd. v. Gold, 48 N.Y.2d 51, 421 N.Y.2d 556 (1979). In so doing, the Court must reach for a fair and reasonable result which does not place one party at the mercy of the other and one which gives effect to the parties' apparent purpose. See Kineon v. Bluegrass Elkhorn Coal Corp., 121 A.D.2d 980, 505 N.Y.S.2d 624 (1st Dept. 1986); Lowy and Donnath, Inc. v. City of New York, 98 A.D.2d 43, 469 N.Y.S.2d 760 (1st Dept. 1983), aff'd, 62 N.Y.S.2d 746. Such a reading of the Contract's express provisions favors plaintiff's position. Moreover, since the Contract was drafted by "NICBT", all latent ambiguities, if any, would be resolved against the defendants. See Jacobson v. Sassover, 66 N.Y.2d 991, 499 N.Y.S.2d 381 (1985) The disparity of sophistication between the parties,

plaintiff's lack of counsel and the coercive tactics employed by "NICBT", i.e., the extrinsic circumstances all favor resolution of conflicting inferences, if any, in favor of the plaintiff, as well. See Record v. Royal Globe Ins. Co., 83 A.D.2d 154, 443 N.Y.S.2d, 755 (2d Dept. 1981).

Plaintiff's case is equally strong with respect to his statutory claim under §50-b of the Civil Rights Law,³ for which there are no exemptions, as, for example, the exemptions for newsworthy matters or for incidental uses which have arisen in connection with the more general privacy rights protected by §51⁴ of the statute. In an analogous situation under the less

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3. A civil remedy for violation of §50-b is statutorily provided by Sec. 50-c of the statute, which reads:

Private right of action.

If the identity of the victim of a sex offense is disclosed in violation of section fifty-b of this article, any person injured by such disclosure may bring an action to recover damages suffered by reason of such wrongful disclosure. In any action brought under this section, the court may award reasonable attorney's fees to a prevailing plaintiff.

4. Sec. 51 of the Civil Rights Law provides in pertinent part:

Action for injunction and for damages.

Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages . . .

restrictive provisions of Sec. 51, the Court of Appeals has unequivocally upheld the "absolute right" of a plaintiff to limit his consent to incursions upon his right of privacy thereunder "in any way he deemed proper or desirable". See Dzurenko v. Gordache, Inc., 59 N.Y.2d 788, 790, 454 N.Y.S.2d 730, 731 (1983).

Notwithstanding any countervailing First Amendment claims which defendants might raise, a balancing of the equities also favors plaintiff's cause. Even newsmen are and should be bound by their contracts. The dignity and efficacy of the First Amendment and of reporting in general are not well-served by broken promises of confidentiality. Plaintiff's comparative lack of sophistication, including his unfamiliarity with the law and the media, his limited educational background,⁵ the coercive tactics employed by "NICBT," and the fact that plaintiff received no monetary benefit, while defendants can expect to profit handily at plaintiff's expense, tip the equitable scales still further in plaintiff's favor. Adding to the scales New York's express public policy against exploitation and further humiliation of victims of sexual offenses, set forth in § 50-b of the Civil Rights Law, tips the balance decidedly in plaintiff's favor.

5. Plaintiff has only a ninth grade education. See Cole Aff. at ¶ 1.

CONCLUSION

For the foregoing reasons and those set forth in elsewhere in plaintiff's papers in support of the motion, and upon the Summons with Notice annexed thereto, plaintiff respectfully urges this Court to grant a temporary restraining order prohibiting the broadcast of the subject videotape interviews and/or any portion thereof and/or any facts and circumstances set forth therein until such time as a hearing is had upon plaintiff's further request for preliminary injunctive relief, pending a final determination of the merits of plaintiff's underlying action, together with such other relief as this Court deems just and proper.

Dated: New York, New York
March 24, 1992

Respectfully submitted,

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